U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 09 March 2005

CASE NOS.: 2004-LHC-1342
2004-LHC-1343

OWCP NOS.: 07-163692
07-168955

IN THE MATTER OF:

EARNESTINE K. HYDE

Claimant

V.

NORTHROP GRUMMAN SHIP SYSTEMS, INC.

Employer

APPEARANCES:

SUE ESTHER DULIN, ESQ.

For The Claimant

PAUL B. HOWELL, ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Earnestine K. Hyde (Claimant) against Northrop Grumman Ship Systems, Inc. (Employer).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice

of Hearing was issued scheduling a formal hearing on November 5, 2004, in Gulfport, Mississippi. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 26 exhibits, Employer/Carrier proffered 38 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs were received from the Claimant and the Employer. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That Claimant was injured on May 6, 2002 and December 9, 2003.

2. That Claimant's injuries occurred during the course and scope of her employment with Employer.

3. That there existed an employee-employer relationship at the time of the accidents/injuries.

4. That Employer was notified of the accidents/injuries on May 6, 2002 and December 10, 2003.

5. That Employer filed Notices of Controversion on May 22, 2002 and December 18, 2003.

6. That informal conferences before the District Director were held on December 10, 2002 and March 17, 2004.

7. That Claimant had an average weekly wage of $647.45 at the time of her first injury.

8. That Claimant received temporary total disability benefits for the injury of May 6, 2002, from May 10, 2002 through May 12, 2002 at a compensation rate of $431.63.

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[1] References to the transcript and exhibits are as follows: Transcript: Tr.___ ; Claimant's Exhibits: CX-___; Employer Exhibits: EX-___; and Joint Exhibit: JX-___.

Claimant also received temporary total disability benefits from April 8, 2003 through November 4, 2003 at a compensation rate of $431.63.

9. That Claimant reached maximum medical improvement on September 13, 2003, for her May 6, 2002 injury, and on December 17, 2003, for her December 9, 2003 injury.

10. That jurisdiction of these claims is under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq.

II. ISSUES

The unresolved issues presented by the parties are:

1. Causation.

2. The nature and extent of Claimant's disability.

3. Entitlement to a **De minimis** award.

4. Claimant's average weekly wage at the time of her second injury.

5. Entitlement to and authorization for medical care and services.

6. Whether Employer is entitled to special fund relief under Section 8(f) of the Act.

7. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant was deposed by the parties on September 25, 2003, and testified at formal hearing. (EX-38). In 1971, she began an apprenticeship program at Ingalls. She completed the program and became a certified welder. She received certificates in filing and typing from Bates Business College in Pascagoula, Mississippi. She also obtained a cosmetology license in the 1980s from Coastal Training. Claimant completed the eleventh grade and she obtained her GED in 2001. (Tr. 28-29).

Claimant began the apprenticeship program in 1971 and remained at Ingalls until 1975. She worked as a welder in Memphis, Tennessee. Upon her return to Pascagoula, Mississippi, Claimant worked as a welder with Fridge-A-Temp. (Tr. 30-31). In 1977, she moved to Chicago, Illinois and worked in the Sears catalog packing department from 1978 until 1980. Claimant returned to employment with Ingalls from 1980 to 1983 and continued working for Sears in Pascagoula until 1985. In 1989, she returned to work at Ingalls as a welder first-class. (Tr. 31-33). Other than a layoff in 1996, Claimant remained permanently and continuously employed by Ingalls as a welder first-class until the May 2002 accident. (Tr. 33-34).

Claimant's job duties as a welder included "[d]ifferent position welding, vertical, overhead, down-hand, horizontal . . . ." She was required to lift and carry objects weighing fifty to fifty-five pounds. Claimant's job duties also included climbing ladders, crawling, kneeling, and squatting. (Tr. 35-36). As a welder, Claimant was required to "get in tight and awkward positions" and to extend her neck. (Tr. 37).

On November 21, 1991, Claimant first injured her right knee when she "fell through a jig." She sought treatment from Dr. Enger and underwent knee surgeries in 1992 and 1993. After the 1993 surgery, Dr. Enger assigned permanent work restrictions. [2] (Tr. 38, 73; CX-9, p. 2). On October 16, 1992, Dr. Enger placed Claimant at "maximum medical recovery" and assigned a 10% disability to her right leg. (Tr. 73-74). Claimant also received treatment to her right knee from Dr. Burwell, who performed another surgery in 1994 and assigned permanent restrictions.[3] (Tr. 40, 75). On October 4, 1994, an "Ingalls Work Restriction Program form" was completed and Claimant's job duties were within the restrictions indicated on the form.[4] (Tr. 42; CX-9, p. 4). In 1997, Dr. Burwell placed her in therapy for her right leg. (Tr. 44).

Claimant also sustained a work-related injury to her left knee, which required surgery in 1997. Dr. Cope performed the surgery and Dr. Wiggins subsequently took over the treatment. (Tr. 44-45).

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[2] Employer's work restriction form shows restrictions of no climbing or squatting. The reports of Dr. Enger indicate he restricted Claimant to "limited" climbing and squatting. (EX-29, p. 2).

[3] The record does not contain reports from Dr. Burwell, nor does it specify the restrictions he assigned to Claimant.

[4] Claimant did not specify the restrictions in place as of October 4, 1994.

After Dr. Cope and Dr. Burwell released Claimant to return to work, she began working in the "CSA shop." In 2002, Employer asked all workers whether they had work restrictions. On February 14, 2002, Claimant completed a form notifying Employer of her work restrictions and she remained employed in the "CSA shop." (Tr. 43). The form indicated that Claimant's knee problem only prevented her from climbing. (Tr. 76). Claimant testified on cross-examination that she did not know why the rest of her restrictions were omitted from the form. However, she stated that she did not request a change in her restrictions because she was working. (Tr. 78).

On May 6, 2002, Claimant injured her neck when she hit her head while crawling under a "jig."[5] She reported her injury to the "work leaderman" who was acting as the supervisor for the day.[6] (Tr. 46-47). She finished her shift on May 6th. She was in pain the next day, but she worked. She could not move when she woke up on the following morning. (EX-38, p. 19). She returned to work the next day, a Thursday, and was given a pass to Employer's hospital. (EX-38, p. 20). Claimant was taken off work for two days and then placed on light duty earning the same wages and working the same hours. (EX-38, p. 21). Claimant worked until April 7, 2003. (EX-38, p. 26).

Claimant chose Dr. Terry Smith as the treating physician for her neck injury.[7] (Tr. 47). Dr. Smith performed an MRI and identified a disk problem. He tried to treat Claimant with therapy, but on April 10, 2003, he performed surgery on Claimant.[8] (Tr. 49; EX-38, p. 24). She subsequently underwent a FCE at Dr. Smith's request on August 21, 2003. On September 13, 2003, Dr. Smith released Claimant to return to work within the restrictions identified by the FCE and placed her at MMI. (Tr. 49-51, 80; CX-14, p. 1). Claimant's release to return to

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[5] Claimant was hit in the head while working in 2000. She was treated by Dr. Dempsey, who informed her that "he didn't see anything wrong." (EX-38, pp. 36-37). She was temporarily placed on light duty. (EX-38, p. 42).

[6] At the time of the May 6, 2002 injury, Claimant was working in the "CSA shop." She had difficulty performing her tasks due to the neck injury and transferred to the "fab shop" in October 2002. (Tr. 54).

[7] Before she saw Dr. Smith, she went to the Singing River Hospital Emergency Room on May 16, 2002. (Tr. 47-48). Claimant went to the emergency room because she experienced a "tingling" in her entire body as she laid down in bed. She also experienced a pain in her neck at that time. (Tr. 48-49). She underwent X-rays and was told to see a neurosurgeon. (EX-38, p. 22).

[8] Before Dr. Smith performed the surgery, Claimant was provided with second and third opinions from Dr. Middleton and Dr. Bazzone. Dr. Bazzone recommended surgery as well. (EX-38, pp. 24-25).

work was effective on September 22, 2003. (Tr. 51). The FCE restricted her lifting and carrying to 25 pounds and did not allow any overhead activity. (Tr. 80). On September 23, 2003, Claimant presented the work release and the FCE to Employer and was "rejected" for employment. (Tr. 52).

Claimant began searching for other employment. However, Employer contacted Claimant on November 5, 2003 and placed her back at work.[9] Another "Return to Work Program" form was completed on November 5, 2003, which stated Claimant could not perform overhead work or lift greater than 25 pounds. (Tr. 80-81; CX-9, p. 17). Claimant and Ms. Wylie signed the return to work form indicating full agreement to the restrictions. (Tr. 82, CX-9, p. 16).

On cross-examination, Claimant testified that she returned to work as a welder. She earned the standard salary of $17.07 per hour, which was more than her salary at the time of her injury on May 6, 2002. (Tr. 83). Upon returning to work, Claimant went to "the welding school" to become re-certified. (Tr. 54). During her re-certification, Claimant's job did not require "line pulling," she used small grinding equipment, and there was limited overhead work. (Tr. 84).

She was eventually placed in the "fab shop" to complete the re-certification process. (Tr. 53-55). While working in the "fab shop," Claimant performed welding at table level and continued earning $17.07 per hour. (Tr. 55, 85). Claimant testified that there was no climbing and no overhead work. Further, there was a "materials coordinator" and an "overhead crane" to assist in moving heavy objects.[10] (Tr. 86). She testified that she had problems performing her work at "table level," but believed she did "pretty good." She testified that she extended her neck "down too far." She also testified that she wore a "shield" and a "helmet" which caused "a strain" as she stood with her head down while welding. (Tr. 55-56). Claimant experienced pain and discomfort in her neck and shoulders, with occasional pain down her arms. (Tr. 56).

At times, Claimant was required to weld on the floor. She experienced muscle spasms due to having her neck extended too far down. (Tr. 56). When welding on the floor, Claimant would either be on her knees or laying flat on her stomach. When

[9] A formal hearing in the matter was set for November 10, 2003. (Tr. 53).
[10] Claimant testified that she was not on "light duty." Rather, Claimant stated she performed her regular job while standing. (Tr. 87-88).

laying flat, Claimant had to "turn around and weld" which caused her to extend her neck. (Tr. 57).

On December 9, 2003, Claimant injured her knees when she "slipped" while working on the floor.[11] (Tr. 58, 60). The following day, she notified her supervisor of the injury. She was given a hospital pass because her knees were swollen. (Tr. 60). Claimant continued to work at "the tables" until she was seen by Dr. Wiggins on December 17, 2003. (Tr. 61).

On December 17, 2003, Dr. Wiggins examined Claimant and gave her a shot in each knee. She informed him that she already had restrictions on her knees. Dr. Wiggins did not assign any "new" restrictions nor did he assign additional disability. Eventually, Dr. Wiggins provided Claimant with knee braces. (Tr. 61-62). Claimant received a release to return to work and presented it to Ms. Wylie. (Tr. 62). The release from Dr. Wiggins stated Claimant could not engage in squatting, kneeling, or climbing ladders. Claimant testified that she informed Dr. Wiggins that she had previous permanent restrictions on her knees, but did not "tell him what to write." (Tr. 92-93).

On December 17, 2003, Ms. Wylie completed Employer's "Return to Work Program" form and indicated Claimant could not return to work with the restrictions assigned to her neck and her knees. (Tr. 94; CX-9, p. 20). Claimant was not placed in employment and did not receive any benefits. (Tr. 63). She did not ask Dr. Wiggins to remove the work restrictions. (Tr. 95).

Claimant began a job search and began working with Mr. Ronnie Smith in January 2004. (Tr. 63, 96). Mr. Smith suggested Claimant apply for employment with a car wash, at the Singing River Mall, and at a Dodge service station. She looked for additional job openings on her own. (Tr. 63). She testified that she applied for a job at Casino Magic, Econo-lodge, and Boomtown Casino after January 14, 2004. However, she did not provide any documentation that she applied for employment at either casino in January 2004. (Tr. 101-103). She testified that she applied for employment at places that were not listed on her job log. (Tr. 114).

[11] Prior to the injury, Claimant complained to Ms. Melinda Wylie about her neck problems and asked to be assigned to the "tables" again. Claimant also informed Mr. Joe Walker that she had problems with working on the floor. (Tr. 58-60).

In May 2004, Claimant began working for "DJ's Shuttle and Tours," a company based in Hattiesburg, Mississippi. (Tr. 64). Her job duties included driving a "shuttle" to transport patients to dialysis and doctor visits. (Tr. 65). She initially earned $7.00 per hour and eventually earned $7.75 per hour. Claimant testified that she worked a varying number of hours each week. However, she stated that she worked three days a week and estimated she worked 32 hours or 33 hours each week. (Tr. 66, 69, 105).

Claimant experienced the most difficulty when transporting patients in wheelchairs. While she did not have to lift the wheelchair patients, she had to "strap them down" which required pulling. Claimant also had to push the wheelchairs onto the lift. In addition, Claimant testified that wheelchairs made the vehicle heavier. It was difficult to look around the patients in wheelchairs. (Tr. 67-68). Claimant experienced muscle spasms in her neck and shoulders. She sought treatment from Dr. Smith, who explained the spasms were "to be expected" and prescribed pain patches. (Tr. 65-66). She testified that she worked six days one week which affected her "real bad." (Tr. 66-67). Claimant left her employment with DJ's Shuttle on October 4, 2004 because "it was too much." (Tr. 68). Claimant left the job on her own, without having her doctor "pull" her from employment. (Tr. 107).

Claimant testified that she looked for other employment after leaving DJ's Shuttle, but her efforts were interrupted due to the death of her mother-in-law.[12] (Tr. 69). She testified that she intends to "follow-up" on a job sitting for an elderly lady. She inquired about open positions at her neighborhood grocery stores. She also inquired about jobs at Magnolia Finance and Sears. (Tr. 70).

Claimant testified that she experiences problems with her neck and shoulders when "sitting in a fixed position too long." She avoids lifting objects and experiences problems when she sweeps. She still experiences muscle spasms. Although she has medication, she tries to avoid taking it until bedtime and testified that she often does not take the medication at all. (Tr. 71). She was not aware of side effects from the muscle relaxers, but testified that she has had stomach problems. (Tr. 72).

[12] Claimant's mother-in-law died on October 16, 2003. Prior to her death, Claimant helped care for her mother-in-law, but was not her "caregiver." (Tr. 108).

On cross-examination, Claimant testified that Employer paid benefits for the 10% disability that Dr. Enger assigned to her right leg. She received over eight thousand dollars after she returned to work. Claimant did not have all of the medical records related to the treatment of her knees since 1992. (Tr. 74). Around October 4, 2004, Claimant began receiving her "retirement" from Employer. (Tr. 109). She also received a disability check from Social Security. (Tr. 110).

In addition to the neck surgery and the knee surgeries, Claimant underwent "ulnar nerve release" on her left arm. She did not have any work restrictions due to that surgery. (EX-38, p. 40).

The Medical Evidence

Employer's Medical Records

On May 9, 2002, Claimant presented to Employer's physicians with complaints of "posterior neck pain" that extended into both "trapezus areas." She also reported a tingling sensation in her hands. Claimant returned to Employer's physicians on May 13, 2002. The report indicates Claimant was better, but she was placed under the following temporary restrictions: no lifting of greater than 25 pounds, limited climbing and line pulling, and no overhead work. (CX-9, p. 5).

On December 10, 2003, Claimant presented to Employer's physicians with swelling in both knees. The report notes that Claimant would see Dr. Wiggins. (CX-9, p. 15).

Dr. Terry Smith

Dr. Smith, a neurosurgeon, was Claimant's treating physician for the May 6, 2002 neck injury. Dr. Smith first examined Claimant on June 15, 2002 and continued treating her until June 12, 2004[13]. (CX-10). On June 15, 2002, Dr. Smith ordered Claimant to undergo an MRI of her cervical spine. The MRI revealed a "mild left sided disc herniation at C5/6." Claimant experienced temporary benefits from physical therapy and decided to pursue a surgical option. (CX-10, pp. 47-50). Dr. Smith released Claimant to work on August 7, 2002, subject to the restriction of no overhead work. (CX-10, p. 46). During the examinations in July and August 2002, Claimant complained of

[13] Dr. Smith's curriculum vitae does not reflect board certification, although it indicates eligibility for certification in the field of neurosurgery. (EX-31, pp. 1-2).

pain in her neck and arms, as well as tingling in her arms and hands. (CX-10, pp. 47-48).

Claimant was taken off work on April 8, 2003. (CX-10, p. 30). On April 10, 2003, Dr. Smith performed a "C5-C6 anterior cervical corpectomy and fusion using iliac crest bone graft." (CX-10, pp. 36-45). On May 21, 2003, Claimant was prescribed physical therapy. (CX-10, p. 24). On August 4, 2003, Dr. Smith opined that Claimant's pre-existing neck injuries "combined and contribute to the effects of the neck injury . . . she sustained on May 6, 2002 to render her materially and substantially more disabled than she would have been as a result of her injury of May 6, 2002 alone. (EX-31, p. 17). Claimant remained off work until September 22, 2003. (CX-10, pp. 9, 17-18, 20, 23, 26).

On August 21, 2003, Claimant underwent a FCE which suggested she perform light work. The FCE limited Claimant's lifting, carrying, pushing, and pulling capabilities to 20 pounds occasionally and 10 pounds frequently. The FCE allowed Claimant to walk and stand frequently and push/pull arm and leg controls. The FCE noted "limited tolerance to working and lifting above shoulder level" and "poor tolerance to sustained cervical extension posture." (CX-10, p. 52). Claimant's non-material handling was limited to occasional "reach above shoulder." Claimant was allowed to perform the following activities frequently: bending, squatting, crawling, and ladder climbing. Claimant demonstrated the ability to engage in the following activities on a "continuous" basis: kneeling, balancing, sitting, standing, walking, alternate sitting and standing, use of hand and foot controls, stair climbing, and "functional movement" of her left and right feet. (CX-10, p. 53).

On September 13, 2003 and December 2, 2003, Claimant indicated that she had "good days and bad days." On December 2, 2003, Claimant informed Dr. Smith that she "can't do work anymore." Dr. Smith opined Claimant could return to work if Employer accommodated her restrictions of lifting and carrying a 25-pound maximum and avoidance of overhead work. Dr. Smith placed Claimant at maximum medical improvement. (CX-10, pp. 4, 16). On September 30, 2003, he assigned a permanent impairment of 9% to Claimant's "body as a whole." (CX-10, p. 7).

On June 12, 2004, Claimant stated that she had muscle spasms in her neck and shoulder. Dr. Smith opined she would "never be completely pain free." (CX-10, p. 5).

Gulf Coast Physical Therapy Center of Pascagoula

Prior to the April 10, 2003 surgery, Claimant underwent physical therapy beginning on July 15, 2002. Upon her initial evaluation, Claimant presented with complaints of "constant aching pain in her posterior cervical region . . . ." She also complained of constant pain with periodic episodes of sharp pain. Claimant indicated that she experienced tingling in her hands, fingers, and feet. (CX-10. p. 67). On July 31, 2002, a progress note indicated that Claimant experienced "good temporary relief following her treatment." (CX-10, p. 70).

After the April 2003 surgery, Claimant returned to physical therapy on May 27, 2003. Among her complaints were limited and painful cervical motion, as well as aching in her trapezius region. (CX-10, p. 63). Progress notes dated June 16, 2003 and July 14, 2003 indicate continued complaints of pain and discomfort, but note that Claimant appeared to be "progressing." (CX-10, pp. 60, 62).

Dr. Victor Bazzone

Claimant was examined by Dr. Bazzone on March 13, 2003, regarding injuries sustained in Claimant's accident on May 6, 2002. The examination was requested by the U.S. Department of Labor (DOL). Claimant presented complaints of stinging in her upper extremities and into the fingers of both hands. She also complained of a loss of strength in her upper extremities. A physical examination revealed tenderness and decreased range of motion in Claimant's neck. Further, Dr. Bazzone found decreased strength in all muscle groups of both upper extremities. After reviewing Claimant's MRI, Dr. Bazzone diagnosed Claimant with "cervical spondylosis with radiculopathy." He recommended that Claimant continue on Vioxx 25mg for one month. He further recommended that Claimant undergo an "ACF at C4-C7" if the medication was not effective.[14] (CX-13, pp. 1-2).

Dr. Chris Wiggins

On December 17, 2003, Claimant presented to Dr. Wiggins with complaints of "bilateral" knee pain due to falling at

[14] On October 25, 2002, Claimant was examined by Dr. Troy Middleton, who opined that Claimant's symptoms would not be reduced by a "C56" discectomy and that such procedure was not necessary as a "prophylactic operation." (CX-12, p. 3). The record does not indicate who requested the examination by Dr. Middleton, nor does it provide his credentials.

work.[15] Physical examination revealed tenderness and swelling to both knees, along with limited range of motion. Claimant's knee stability and muscle strength were normal. Dr. Wiggins opined Claimant would continue to experience knee problems "more so from pre-existing difficulty than this." He allowed her to continue at work and stated she reached MMI with no new permanent partial disability.[16] Claimant informed Dr. Wiggins of existing permanent restrictions on her knees and asked that he include the restrictions in writing. Dr. Wiggins signed a work release form stating Claimant could return to work on December 17, 2003 with permanent restrictions of no squatting, no kneeling, and no ladder climbing.[17] (EX-36, pp. 2-4).

Medical records regarding previous injuries

On October 19, 1992, Dr. Daniel Enger released Claimant to work with a 10% permanent partial disability to her right leg. He suggested Claimant limit her climbing and squatting as much as possible. (CX-10, p. 100; CX-29, p. 2). On January 6, 1993 and February 4, 1993, Dr. Enger examined Claimant for injuries sustained at work on December 3, 1992.[18] According to Dr. Enger's report dated January 8, 1993, Claimant was struck along the right side of her neck by a "welding box." Claimant complained of pain in her neck extending into her head and behind her ear. Dr. Enger diagnosed Claimant with "history of contusion right side of the neck." He did not assign "permanent or partial disability" and allowed Claimant to continue working. (CX-10, pp. 100-103).

On December 7, 1999, Claimant sustained another injury when a "flux core box" fell on her head. She was initially examined by Employer's physicians on December 7, 1999 and December 9, 1999. (CX-10, p. 88). An "Emergency Room History and Physical" was performed on December 9, 1999, in which Claimant complained of a headache, neck pain, nausea, and dizziness. A "C-spine" x-ray was unremarkable and she was diagnosed with "acute cervical sprain close head injury." (CX-10, pp. 90-91). Claimant was released to return to work without restrictions effective

[15] The record does not reflect Dr. Wiggins's credentials.
[16] Claimant told Dr. Wiggins that she had already been assigned a 10% permanent partial disability to each leg. (EX-36, p. 3).
[17] According to the report, Claimant told Dr. Wiggins that these restrictions already existed, but were sometimes overlooked. Claimant requested that Dr. Wiggins put the restrictions in writing. (EX-31, p. 3).
[18] Claimant also sought treatment for her injury with Employer's doctors on December 7, 1992, December 11, 1992, December 14, 1992, and December 15, 1992. She was allowed to return to work on December 17, 1992. (CX-10, pp. 98-99).

December 11, 1999. (CX-10, p. 93).

On July 11, 2000, Claimant experienced pain in her neck, head, and back after a "flexco" hit her. She was examined by Employer's physicians on July 11, 2000. No "contusions, edema, or deformities" were noted and Claimant was to return to work the following day if she felt better. On July 12, 2000, Claimant returned to Employer's physicians with complaints of pain and was sent to Singing River Hospital emergency room. (CX-10, pp. 74, 84). On July 17, 2000, Employer's physician released Claimant to work with no lifting of greater than 25 pounds, no line pulling, and no overhead work. On July 20, 2000, Employer temporarily restricted Claimant's work to no welding and no sweeping. (CX-10, pp. 85-86).

On August 7, 2000, Claimant was examined by Dr. Thomas R. Dempsey. A review of Claimant's cervical and thoracic x-rays revealed degenerative changes. Claimant was placed on light duty work with restrictions of no bending, no twisting, no pulling, no pushing, no pulling, and no lifting over 20 pounds. (CX-10, pp. 76, 82). These restrictions remained in place until Claimant was allowed to return to full duty on August 16, 2000. (CX-10, pp. 80). Dr. Dempsey's last report is dated August 23, 2000 and Claimant remained on full duty. (CX-10, pp. 80, 78).

The Vocational Evidence[19]

Northrop Grumman Return to Work Forms

Employer's work restriction form dated March 9, 1992, placed permanent restriction of no climbing or squatting on Claimant's work activities. (CX-9, p. 2). Employer's permanent work restriction form dated February 14, 2002 listed only the restriction of no climbing. (CX-9, p. 4). A September 23, 2003, restriction form limited her to lifting of 20 pounds occasionally and 10 pounds frequently. It also restricted her to "limited" overhead work. (CX-9, p. 14). On November 5, 2003, Employer's permanent work restriction form listed the following restrictions on Claimant's activities: limited lifting of no greater than 25 pounds and no overhead work. The form indicated that Claimant would be able to work within her restrictions. (CX-9, p. 17). Employer's permanent work restriction form dated December 17, 2003 listed the following restrictions for Claimant: no ladder climbing, no kneeling or

[19] Claimant maintained a "Job Search Log" which listed positions she applied for between September 26, 2003 and November 4, 2003, as well as between January 7, 2004 and May 5, 2004. (CX-20).

squatting, no overhead work, and limited lifting of no greater than 25 pounds. Employer indicated Claimant could not work within the restrictions which "referenced" her neck and knee injuries. (CX-9, p. 20).

Tommy Sanders

Mr. Sanders performed an initial labor market survey in this matter on October 21, 2003. In his report, Mr. Sanders considered Claimant's educational background and vocational training. He also considered the restrictions of no overhead work and limited lifting/carrying of no more than 25 pounds, following her spinal surgery in April 2003. He noted Claimant underwent multiple surgeries on her right knee, one surgery on her left knee, "ulnar nerve surgeries at the mid-arm," and a left carpal tunnel release. (EX-32, pp. 3-4). He identified the following five potential employment opportunities:

> (1) a full-time desk clerk at Super Motel 8 in Ocean Springs, Mississippi. The job required negligible lifting, sitting, standing, and walking. The job also required "intermittent bending." The job duties included greeting customers, "processing the customers in and out," and accepting payment and reservations. The position paid $5.75 per hour and was available as of September 23, 2003. (EX-32, p. 4).
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> (2) a full-time reservations sales agent with Casino Magic in Biloxi, Mississippi. The position was a sedentary position. The job duties included answering a multi-line phone system, taking reservations, and advising customers of features offered by the casino. The position paid $7.75 per hour or more. (EX-32, p. 4).
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> (3) a full-time credit cashier with Boomtown Casino in Biloxi, Mississippi. The job required occasional lifting up to 20 pounds, as well as occasional bending and stooping. The position also entailed frequent to constant standing and walking. The job duties included completing and recording monetary transactions, light data entry, and operating a "10-key." The position paid $7.75 per hour and entailed working from 12:00 a.m. until 8:00 a.m. (EX-32, p. 5).
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> (4) a full-time booth cashier with Republic Parking at the Biloxi-Gulfport Airport. The job required intermittent sitting and standing/walking, with "negligible" lifting.

The job duties included operating a cash register and providing tickets for parking privileges. It also included providing a receipt and change if needed. The position paid $6.00 per hour. (EX-32, p. 5).

(5) a full-time fuel booth cashier with Coastal Energy. The job required infrequent bending, stooping and squatting. The employee could sit, stand, and "move about." The position required occasional lifting of 10 pounds or less. The job duties included operating a cash register and credit card machine, cleaning restrooms and emptying trash, and taking pump readings. The position paid $6.15 per hour. (EX-32, p. 5).

On January 14, 2004, Mr. Sanders performed another labor market survey which considered the following restrictions: no lifting of more than 25 pounds, avoidance of overhead work, no climbing, no squatting, and no kneeling. Again, Mr. Sanders also considered Claimant's education, training, and experience. (EX-32, p. 6). He identified the following three job opportunities:

(1) a full-time desk clerk at the Econo Lodge in Moss Point, Mississippi. The job required occasional standing/walking, frequent sitting/handling, and negligible lifting. The duties included registering guests, assigning rooms and issuing keys, accepting payments, and taking reservations. The employee would also balance a cash drawer and perform light data entry. The job paid $5.50 per hour. (EX-32, p. 6).

(2) a full-time reservation clerk with Casino Magic in Biloxi, Mississippi. The job was a sedentary position and paid $7.75 per hour. The employee would answer a multi-line phone system, quickly determine the status of inventory, and take reservations. Training would be provided and three positions were available. (EX-32, p. 6).

(3) a full-time PBX operator at Grand Casino in Biloxi, Mississippi. The job was a sedentary position. The job duties entailed answering a switchboard and connecting calls. The employee would also be responsible for paging, scheduling wake-up calls, and "do not disturb" messages. The position required an employee with a clear speaking voice and the availability to work any shift. Training would be provided and the position paid $7.25 per hour.

(EX-32, p. 7).

On February 6, 2004, the descriptions for six of the identified jobs were submitted to Dr. Smith and Dr. Wiggins for approval: (1) desk clerk at Econo Lodge, (2) reservations clerk with Casino Magic, (3) PBX operator with Grand Casino/Biloxi, (4) credit cashier with Boomtown Casino, (5) booth cashier with Republic Parking, and (6) fuel booth cashier with Coastal Energy. Dr. Smith approved all six jobs as suitable for Claimant. (EX-32, pp. 10-11). Dr. Wiggins approved only the jobs with Econo Lodge, Casino Magic, and Grand Casino/Biloxi as suitable employment for Claimant. Dr. Wiggins indicated the position with Boomtown Casino required too much lifting and the job with Republic Parking required too much walking. (EX-32, pp. 8-9).

Mr. Joe H. Walker

Mr. Walker, as a consultant for the DOL, monitored Claimant's return to work activity with Employer in November 2003. (EX-35, p. 2). On December 4, 2003, Mr. Walker generated a vocational rehabilitation report regarding the period of October 31, 2003 through December 4, 2003. The report provided a brief summary of Claimant's work history with Employer, including the injury of May 2002 and her previous injuries and treatment. (EX-35, pp. 5-6). He indicated that Employer approved Claimant's return to work on October 31, 2003 and requested that she report to work on or before November 10, 2003. (EX-35, p. 8).

On November 10, 2003, Ms. Wiley confirmed that Claimant returned to work on November 5, 2003 and was assigned to the "Training/Recertification Center." Her return to work form noted restrictions of "limited lifting, no greater than 25 pounds, and no overhead work." On November 11, 2003, Mr. Walker met with Claimant, Claimant's supervisors, and Ms. Wiley. (EX-35, p. 8). Claimant agreed that her work activity complied with her work restrictions. However, she described "continued and on-going" tingling in her hands and feet, along with "symptoms" in her neck and shoulder area. Claimant also made "comments" about her posture while welding and wearing a hard hat and shield. Claimant further indicated that the work restrictions provided by Dr. Smith "may be somewhat of a variation of the restrictions listed in the Functional Capacity Evaluation report," but she did not offer clarification of her concern. (EX-35, p. 9).

On November 18, 2003, Mr. Walker met with Claimant who continued to work within the work restrictions. However, Claimant continued to complain of discomfort in her neck and shoulder area. Claimant earned $17.07 per hour while performing modified work activities. (EX-35, pp. 11-12). Mr. Walker followed-up on November 25, 2003, and learned that Claimant completed her re-certification. Claimant indicated that materials were placed on her welding table by the Materials Coordinator either manually or by use of an overhead crane. The report noted that Claimant experienced neck and shoulder pain while performing "downhand" welding on "an inverted flat panel or plate." (EX-35, p. 13).

On December 3, 2003, Mr. Walker followed-up with Claimant and her supervisors. Claimant continued experiencing discomfort in her neck and shoulders. She indicated that the Materials Coordinator moved her work materials on and off the welding table. Claimant had not performed work activity on the floor with the exception of the incident noted on November 25, 2003. (EX-35, p. 14).

Mr. Walker completed a second vocational rehabilitation report on December 19, 2003, which regarded the period of December 5, 2003 through December 19, 2003. On December 9, 2003, he met with Ms. Wiley, who indicated that she had spoken to Claimant regarding her discomfort from the modified work activity. Claimant expressed difficulty "performing welding on foundations in the middle of the table." Claimant was encouraged to seek clarification of her restrictions with Dr. Smith. (EX-35, pp. 16). On December 16, 2003, Mr. Walker again met with Ms. Wiley. He reviewed the FCE as revised by Dr. Smith, along with Claimant's work restriction forms. He noted no significant variation. He did not meet with Claimant because she was absent from work on that date. (EX-35, pp. 16-17).

On December 18, 2003, Mr. Walker returned to Employer's facility and Claimant was again absent from work. He learned that Claimant received a hospital pass on December 17, 2003 and was "placed off work, pending medical or an industrial leave of absence." A revised work restriction form dated December 17, 2003 assigned "supplemental restrictions" of no squatting, no kneeling, and no ladder climbing, due to Claimant's prior injuries combined with her cervical spine injury. Employer could not provide "permanent, alternative work activity" based on Claimant's revised restrictions. (EX-35, pp. 17-18).

Mr. Ronnie Smith

On February 4, 2004, Mr. Smith generated a "Placement New Employer Plan Justification" for Claimant.[20] In the plan, Mr. Smith noted Claimant's injuries and restrictions, as well as her educational and work background. Mr. Smith administered the "General Aptitude Measure for Adults" and Claimant achieved an IQ score of 80, which placed her in the "Low Average range." On the Wide Range Achievement Test-3, Claimant scored at the post high school level in reading, at a high school level in spelling, and at a 7th grade level in math. Mr. Smith opined the Wide Range Achievement Test was a "more valid" assessment of Claimant's academic abilities. He noted Claimant was interested in obtaining employment quickly and had already sought employment or training. (EX-37, pp. 2-3).

On February 22, 2004, Mr. Smith wrote a vocational rehabilitation report regarding the period of January 16, 2004 through February 22, 2004. The report reflected his initial meetings with Claimant, as well as his development of job leads. He noted Claimant made "a good number of contacts on her own." He found Claimant to be "highly motivated" in her job search. (EX-37, pp. 7-11). On February 3, 2004, Claimant indicated that she applied for employment with a florist, at Hampton Inn, as a PBX operator at a casino, as a reservation clerk with the Grand Casino and Casino Magic, as a sales clerk with Wal-Mart, and at a local handicap assistance agency. (EX-37, p. 9).

On April 20, 2004, Mr. Smith wrote a second vocational rehabilitation report regarding the time period from February 23, 2004 through April 20, 2004. During that time, Mr. Smith contacted several businesses and potential employers about job openings for Claimant. He also contacted Claimant numerous times to discuss her job search and any potential leads. Claimant made contacts on her own and explored the idea of training with a florist. Mr. Smith was still unable to place Claimant in employment and noted she had limited gas money to continue her search. (EX-37, pp. 13-19).

On June 8, 2004, Mr. Smith generated another vocational report for the period of April 21, 2004 through June 8, 2004. Mr. Smith and Claimant considered the idea of an "on-the-job-training program" with a florist and both contacted Betty Fabber at Betty's Florist. (EX-37, pp. 20-21). Subsequently, on May 6, 2004, Claimant informed Mr. Smith that she contacted DJ's

[20] Mr. Smith's credentials are not provided in the record.

Shuttle Service regarding a job as a driver. He met with Mr. John Williams, the owner of the company, who indicated the job would comply with Claimant's physical restrictions. She began her job on May 10, 2004. On May 13, 2004, Mr. Smith spoke with an employee of DJ's Shuttle Service who stated that Claimant was working and doing well. On June 3, 2004, he spoke with Claimant who informed him that she worked three days each week, for a total of 32 hours. She earned $7.00 per hour and indicated that she had "good days and bad days." (EX-37, pp. 21-23).

The period of June 9, 2004 through July 11, 2004 is reflected in Mr. Smith's report dated July 11, 2004. On July 7, 2004, Claimant indicated she was working the same hours and had applied for a job with the school system. Claimant had been working for 60 days. She averaged 35.4 hours per week at a rate of $7.00 per hour. Her average wage was $247.80 per week. Claimant reported increased discomfort with her neck. (EX-37, pp. 25-26).

The Contentions of the Parties

Claimant contends she sustained a work-related injury to her neck on May 6, 2002, which resulted in permanent partial disability. She further contends she sustained work-related injuries to her knees on December 9, 2003, which resulted in permanent total disability after Employer declined to provide suitable modified employment on December 17, 2003. Claimant argues her permanent total disability continued until Employer performed a labor market survey on January 14, 2004, after which she would be entitled to permanent partial disability based on an earning capacity of $269.20 per week. Claimant argues that the wages earned with DJ's Shuttle and Tours should be adjusted to reflect their value at the time of the May 6, 2002 injury. Finally, Claimant argues she is entitled to a **de minimis** award from November 3, 2003 through December 17, 2003.

Employer contends Claimant's knee injuries should be determinative of the nature and extent of her disability under the "two-injury" rule. Employer further argues that the claim for continuing benefits from the May 6, 2002 injury should be denied because it established suitable alternative employment by placing Claimant on modified duty upon her November 5, 2003 return to work. Employer contends Claimant is not entitled to a **de minimis** award because she failed to establish a substantial possibility of a future loss of wage earning capacity. Employer also contends Claimant is not entitled to disability benefits with regard to her knee injuries sustained on December 9, 2003.

According to Employer, it demonstrated suitable alternative employment, thereby limiting Claimant to a scheduled permanent partial disability award for her legs. Employer argues that Claimant has already received a scheduled award for her legs and is not entitled to further scheduled payments without an increased disability rating. In addition, Employer argues Claimant should not receive disability benefits after her voluntary withdrawal from suitable alternative employment. Employer further contends Claimant earned an average weekly wage of $729.27 at the time of the December 9, 2003 injury. Finally, Employer argues it is entitled to Section 8(f) relief if any continuing benefits are awarded for either the May 2002 or December 2003 injuries.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm

constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary-that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) she sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which **could have caused** the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

Based on the stipulations of the parties, Claimant was injured on May 6, 2002, during the course and scope of her employment. Additionally, the parties stipulated that Claimant was injured on December 9, 2003, during the course and scope of her employment with Employer.

B. Nature and Extent of Disability

The parties stipulated that Claimant suffers from compensable injuries, however the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award,

an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and her inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if she has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that she is unable to return to her regular or usual employment due to her work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of her usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing her usual employment, she suffers no loss of wage earning capacity and is no longer disabled under the Act.

C. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when her condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

I disagree with Employer's proposition that Claimant's knee injury is the "primary injury" in this case. While Employer accommodated Claimant's restricted work capabilities following her neck injury, these accommodations arguably became less relevant on December 17, 2003, when Employer would no longer employ Claimant due to the combination of neck restrictions and knee restrictions. Further, the parties' stipulations and the previous order entered in this matter regarding the May 2002 injury was not designated a final order. The order provided a settlement of all past benefits and specifically reserved Claimant's right to seek future benefits. Consequently, any disability benefits due to Claimant after November 4, 2003, as a result of her neck injury, were not settled in the compensation order and will be addressed herein.

I further disagree with Employer's reliance on Foundation Constructors, 950 F.2d 621 (9th Cir. 1991), as support for its contention that Claimant's knee injury should determine the nature and extent of her disability. Foundation Constructors addressed an issue of liability under the "last employer rule." The Ninth Circuit sought to clarify the application of the last employer rule in occupational disease cases and in "injury cases." The court stated that the "two injury rule" is applied in "injury or cumulative trauma cases." Id. at 74. The court referred to the two-injury rule as the "aggravation rule" and noted that it was "merely a special application of the last

employer rule." Id. Although the Ninth Circuit applied the two injury rule and assigned liability for the entirety of the claimant's injuries to the last employer, it is noteworthy that the injury was a "cumulative trauma injury" to the claimant's back. The claimant performed similar work activities for two different employers and his back injury resulted from the activities performed on both jobs. Consequently, under the second injury rule, the second employer was liable for the entirety of the claimant's back injury because the subsequent back injury "aggravated, accelerated, or combined with claimant's prior injury." Id. at 75.

The instant case is distinguishable from Foundation Constructors in two ways. First, the present matter concerns only one employer. The two injury rule cited by Employer is used to determine liability when multiple injuries are sustained by a claimant during the course of her employment with multiple employers. Because the two accidents and two injuries at issue in the present case occurred during the course of Claimant's employment with Employer only, I find there is no basis to invoke the two injury rule. Further, even if the two injury rule could be applied in the present case to identify a "primary" injury, the present case concerns two separate and independent injuries to separate parts of Claimant's body. Unlike Foundation Constructors, Claimant injured her neck and subsequently injured both knees in an unrelated work accident. Thus, Claimant's knee injuries did not result in an aggravation of or cumulative injury to the earlier neck injury.

Based on the foregoing, I find and conclude that the injuries to Claimant's neck and knees are determinative of the nature and extent of Claimant's disability.

The parties stipulated that Claimant reached MMI for her May 2002 neck injury on September 13, 2003. The parties further stipulated that Claimant reached MMI for her December 2003 knee injury on December 17, 2003. Based on a review of the medical reports in the record, I find and conclude the stipulations are supported by the evidence of record.

1. Scheduled Disability Benefits

If the permanent disability is to a member identified in the schedule, as in the instant case, the injured employee is entitled to receive two-thirds of her average weekly wage for a specific number of weeks, regardless of whether her earning capacity has been impaired. See Henry v. George Hyman

Construction Co., 749 F.2d 65, 17 BRBS 39 (CRT) (D.C. Cir. 1984).

In the case of permanent partial disability, Section 8(c)(2) of the Act provides an employee with "leg lost" compensation for 288 weeks at a rate of sixty six and two-thirds percent of the average weekly wage. Section 8(c)(19) of the Act further states that "compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member."

In 1991, Claimant injured her right knee and was assigned a 10% disability to her right knee by Dr. Enger in 1996. Employer paid compensation benefits for the 10% disability. Following her knee injury in December 2003, Dr. Wiggins assigned no new permanent partial disability rating to Claimant's knees. Because Employer has already compensated Claimant for the 10% disability to her lower extremities, I find and conclude that no additional scheduled compensation is due as no additional disability has been assigned.

2. The Non-Scheduled Benefits

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by a showing that she is totally disabled. Potomac Elec. Power Co. v. Director OWCP, 449 U.S. 268, 277 n.17, 14 BRBS 363 (1980)(herein "PEPCO"); Davenport v. Daytona Marine & Boat Works, 16 BRBS 168, 173 (1984). Unless the worker is totally disabled, however, she is limited to the compensation provided by the appropriate schedule provision. Winston v. Ingalls Shipbuilding, Inc., 16 BRBS 168, 172 (1984).

As a welder, Claimant's regular and unmodified job duties required her to perform welding in many different positions, including vertically, overhead, "down-hand," and horizontally. The lifting requirement ranged from 50 to 55 pounds. Claimant testified that her job as a welder required ladder climbing, crawling, kneeling, and squatting. At the time Claimant returned to employment on November 5, 2003, Dr. Smith had placed the following permanent restrictions on Claimant's work activities: lifting and carrying a maximum of 25 pounds and avoidance of overhead work. Thus, Claimant could not perform her regular job duties with the permanent restrictions assigned by Dr. Smith.

Subsequently, Claimant injured both knees on December 9, 2003. Claimant already had a 10% impairment rating to her knees with permanent restrictions of no climbing and no squatting. The impairment rating was not increased due to the December 2003 injury; however, an additional limitation of no kneeling was added to her permanent job restrictions. The record contains no evidence to suggest that Claimant was not working within her permanent restrictions prior to December 17, 2003. However, Employer could no longer provide Claimant with suitable modified employment with the additional restriction of no kneeling and the combination of restrictions due to Claimant's neck and knee injuries. Accordingly, I find and conclude Claimant was totally disabled as a result of her work-related injuries and could not return to the modified employment she had performed since November 5, 2003.

Based on the foregoing, I find and conclude Claimant has presented a **prima facie** case of total disability due to her compensable neck injury and due to her compensable knee injuries.

D. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following her injury, that is, what types of jobs is she capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which she reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes,

930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988).

The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., 930 F.2d at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., 930 F.2d at 430. Conversely, a showing of one **unskilled** job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that she tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F.2d at 1042-1043; P & M Crane Co., 930 F.2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, 661 F.2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate

employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991).

In view of Claimant's multiple injuries and varying periods of work capacity, my findings and conclusions regarding Claimant's disability status are reflected in each time period as discussed below.

May 6, 2002 through November 4, 2003

The parties entered into a "Joint Motion to Remand with Stipulations" which was approved by the undersigned on November 21, 2003. The joint motion stipulated that Employer paid compensation for the appropriate disability periods prior to November 2003. Consequently, I find and conclude that Employer has paid the compensation due to Claimant from May 6, 2002 through November 5, 2003.

November 5, 2003 through December 16, 2003

On November 5, 2003, Claimant returned to work with Employer. Because Claimant reached MMI on September 13, 2003 and could not return to her former employment, Claimant established a **prima facie** case of permanent total disability. However, Employer agreed to accommodate Claimant's permanent work restrictions and she returned to work earning an hourly wage of $17.07, a greater hourly wage than $16.52 which she earned at the time of her injury. Even after the injury to her knees on December 9, 2003, Claimant continued to work for Employer until December 17, 2003. Consequently, I find and conclude Employer demonstrated suitable alternative employment and Claimant did not suffer a loss in her wage earning capacity from November 5, 2003 through December 16, 2003.

December 17, 2003 through January 13, 2004

On December 17, 2003, Dr. Wiggins opined Claimant could return to work, but placed the following permanent restrictions on her work activities: no climbing, no squatting, and no kneeling. These restrictions were in addition to Claimant's existing permanent neck restrictions of no lifting and carrying of greater than 25 pounds and avoidance of overhead work. Based on the combination of neck and knee restrictions, Employer could no longer provide suitable modified employment for Claimant.

Employer submitted a labor market survey performed by Mr. Sanders on October 21, 2003, prior to Claimant's return to work

at modified duty with Employer. Given the date of the labor market survey, it was arguably intended to establish suitable alternative employment for the period of time prior to Claimant's return to modified duties with Employer on November 5, 2003. In that respect, the labor market survey is moot because the parties stipulated that all benefits were paid for the time prior to Claimant's November 2003 return to work.

In the event the labor market survey was submitted to establish suitable alternative employment for the time after Claimant was released from employment on December 17, 2003, I further find and conclude the October 21, 2003 survey is insufficient. The labor market survey was performed before Dr. Wiggins assigned the permanent restrictions of no climbing, no squatting, and no kneeling due to the December 2003 knee injuries. Arguably, the labor market survey presented two open positions that may have complied with Claimant's later knee restrictions, as well as her neck restrictions. These positions were the desk clerk at the Super 8 Motel and the reservations sales agent with Casino Magic. Nonetheless, the labor market survey was performed in October – approximately two months before Claimant's termination on December 17, 2003. The vocational evidence does not indicate that either position was regularly available. Accordingly, I find and conclude the labor market survey of October 21, 2003 does not establish suitable alternative employment for the period of time following Claimant's termination in December 2003.

Based on the foregoing, I find and conclude Claimant was permanently and totally disabled from December 17, 2003 through January 13, 2004, because she could no longer perform her pre-injury modified work duties and she had reached a state of permanency with regard to both injuries.

January 14, 2004 through May 9, 2004

On January 14, 2004, Mr. Sanders performed a labor market survey considering the following restrictions: lifting and carrying of no more than 25 pounds, no overhead work, no climbing, no squatting, and no kneeling. Mr. Sanders identified three potential employment opportunities that complied with Claimant's work abilities. The potential positions with Casino Magic and Grand Casino were considered "sedentary" in nature and the employers provided job training. The third position, with Econo Lodge, required occasional standing and walking, frequent sitting, and negligible lifting. In February 2004, Claimant's two treating physicians, Dr. Smith and Dr. Wiggins, approved the

three positions as suitable employment for Claimant given her permanent restrictions. Based on the job descriptions contained in the record and the approval of Claimant's treating physicians, I find and conclude Employer demonstrated the availability of suitable alternative employment from January 14, 2004 to May 9, 2004, which paid an average of $6.83 per hour, or $273.20 per week.[21]

Claimant may maintain total disability if she diligently tried to secure employment even though her efforts were unsuccessful. See Hairston v. Todd Pacific Shipyards Corp., 849 F.2d 1194 (9th Cir. 1988); Fox v. West State, Inc., supra; Hooe v. Todd Shipyards Corp., 21 BRBS 258 (1988). The claimant must establish reasonable diligence in attempting to secure some type of suitable alternate employment within the scope of opportunities shown by the employer to be reasonably attainable and available, and must establish a willingness to work. New Orleans (Gulfwide) Stevedores v. Turner, supra.

Claimant maintained a "Job Search" log which detailed her employment search from January 7, 2004 through May 5, 2004. During that time, she submitted seven written applications to potential employers. She contacted an additional seven potential employers without submitting an application. These employers either told her to return at a later date, that the position had been filled, or that the employer changed its mind.

Claimant maintained contact with Mr. Smith regarding her efforts to obtain employment. Mr. Smith provided Claimant with potential leads and noted that she made "a good number of contacts on her own." Mr. Smith noted Claimant applied for the position as a PBX operator and for positions with Grand Casino and Casino Magic, although her job log did not reflect the submission of such applications. Mr. Smith noted Claimant was "highly motivated."

I find and conclude Claimant diligently attempted to secure employment and that her unsuccessful attempts at obtaining employment are sufficient to support an award of total disability despite Employer's demonstration of suitable alternative employment. Accordingly, I find and conclude Claimant remained entitled to permanent total disability benefits from January 14, 2004 through May 9, 2004.

[21] The hourly rate of the three jobs yielded an average hourly rate of $6.83. ($5.50 + $7.75 + $7.25 = $20.50) ($20.50 ÷ 3 = $6.83) ($6.83 x 40 hours = $273.20).

May 10, 2004 through October 4, 2004

On May 10, 2004, Claimant began working for DJ's Shuttle and Tours. I find and conclude that her job sufficiently constituted suitable alternative employment. Accordingly, Employer remained liable for permanent partial disability benefits based on the difference between Claimant's average weekly wage and her weekly earning capacity with DJ's Shuttle and Tours. (See discussion of average weekly wage, infra.)

Claimant submitted wage records from DJ's Shuttle and Tours which indicate she earned $7.00 per hour from May 10, 2004 through July 11, 2004. The wage records further indicate Claimant worked a varying number of hours each week, ranging from 40 hours plus overtime to 23 hours each week. In addition, six weeks of wage records from May 17, 2004 through June 27, 2004 are missing because Claimant could not locate all of her pay check stubs. Therefore, the gross wages reflected in the three weeks contained in the record will be averaged and that average will be considered Claimant's wage earning capacity for the period in which she earned $7.00 per hour. Accordingly, I find and conclude Claimant's wage earning capacity from May 10, 2004 through July 11, 2004 was $253.63 per week.[22] I further find and conclude Claimant is entitled to permanent partial disability benefits from May 10, 2004 through July 11, 2004 based on the difference in her average weekly wage of $762.42 and her weekly wage earning capacity of $253.63.

On July 12, 2004, Claimant began earning $7.50 per hour with DJ's Shuttle and Tours. The record contains her wage records from July 12, 2004 through August 22, 2004. However, there is no record of Claimant's wages for the week of August 9, 2004. Claimant's wage records from August 23, 2004 through September 12, 2004 are absent from the record. Consequently, I will assume that she continued to earn $7.50 per hour through September 12, 2004. Again, the gross wages reflected in the record will be averaged and that average will be considered Claimant's wage earning capacity for the period in which she earned $7.50 per hour. I find and conclude Claimant had a weekly wage earning capacity of $285.79 from July 12, 2004 through September 12, 2004.[23] I further find and conclude Claimant is entitled to permanent partial disability benefits from July 12, 2004 through September 12, 2004 based on the difference in her average weekly wage of $762.42 and her weekly

[22] ($293.65 + $306.25 + $161.00 = $760.90) ($760.90 ÷ 3 = $243.63).
[23] ($314.63 + $311.25 + $258.38 + $174.38 + $370.31 = $1,428.95) ($1,428.95 ÷ 5 = $285.79).

wage earning capacity of $285.79.

On September 13, 2004, Claimant's wage records reflect a wage increase to $7.75 per hour. During the week of September 13, 2004, Claimant worked a total of 33.31 hours. The record does not contain wage information for a two week period between September 20, 2004 and October 3, 2004. Claimant ceased her employment with DJ's Shuttle and Tours on October 4, 2004; thus, her check stub for the week of October 4, 2004 through October 10, 2004, reflects only 11.1 hours.

I find and conclude Claimant worked an average of 33.31 hours at an hourly rate of $7.75 during the three week period of September 13, 2004 through October 1, 2004.[24] Accordingly, I find and conclude that Claimant had a weekly wage earning capacity of $258.15.[25] I further find and conclude Claimant is entitled to permanent partial disability benefits from September 13, 2004 through October 4, 2004 based on the difference in her average weekly wage of $762.42 and her weekly wage earning capacity of $258.15.

October 5, 2004 through present

The relevant provisions of the Act provide that claimants shall receive compensation for a diminished ability to earn wages, i.e., a loss of wage earning capacity. See 33 U.S.C. §908(c)(21). The fact that a claimant withdraws from the labor market following an injury, therefore, does not affect her entitlement to benefits where a loss in earning capacity is established. Hoopes v. Todd Shipyards Corporation, 16 BRBS 160, 163 (1984); see also Lorenz v. FMC Corp., Marine and Rail Equipment Division, 12 BRBS 592 (1980); Schenker v. The Washington Post Co., 7 BRBS 34 (1977).

Claimant ceased her employment with DJ's Shuttle and Tours on October 4, 2004. She testified that she continued to experience pain and muscle spasms while employed with DJ's Shuttle and Tours, and she left the job on her own. At the time she ceased employment with DJ's Shuttle and Tours, Claimant earned less than she earned with employer.

Thus, Claimant's wage earning capacity was diminished from

[24] The average does not take into account the 11.1 hours worked during Claimant's last week of employment because I find that an 11.1 hour work week does not adequately represent the usual number of hours worked by Claimant.

[25] (33.31 x $7.75 = $258.15) ($258.15 + $258.15 + $258.15 = $774.45) ($774.45 ÷ 3 = $258.15)

her pre-injury earnings and her voluntary withdrawal from the labor market does not change that fact. Accordingly, I find and conclude Claimant continued to experience a loss of wage earning capacity as established through evidence of suitable alternative employment. Consequently, Claimant remains entitled to benefits representing the difference between her average weekly wage of $762.42 and her wage earning capacity of $258.15.

Claimant relies on Richardson v. General Dynamics Corp., 23 BRBS 327 (1990), as support for the argument that the wages established by suitable alternative employment should be adjusted to reflect their value at the time of the May 2002 injury. The parties stipulated that all benefits due and owing prior to November 2003 had been paid. As of November 5, 2003, Claimant returned to employment with Employer. Claimant performed modified job duties, but maintained welder's wages which were actually higher than the wages she earned in May 2002. It was not until December 2003 that Claimant experienced an actual loss of wages due to a permanent total disability and suitable alternative employment was established in January 2004. Consequently, I find and conclude it is unnecessary to perform a wage adjustment in the present case.

E. Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average **annual** earnings, 33 U.S.C. § 910 (a)-(c), which are then divided by 52, pursuant to Section 10(d), to arrive at an average **weekly** wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. SGS Control Services v. Director, OWCP, supra, at 441; Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137 (1990); Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976), aff'd sum nom. Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, her annual earnings are computed using his actual **daily** wage. 33 U.S.C. § 910(a). Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, her average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year. 33 U.S.C. § 910(b). But, if neither of these two methods "can reasonably and fairly be applied" to

determine an employee's average annual earnings, then resort to Section 10(c) is appropriate. Empire United Stevedore v. Gatlin, 935 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).

Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings.

In Miranda v. Excavation Construction Inc., 13 BRBS 882 (1981), the Board held that a worker's average wage should be based on her earnings for the seven or eight weeks that she worked for the employer rather than on the entire prior year's earnings because a calculation based on the wages at the employment where she was injured would best adequately reflect the Claimant's earning capacity at the time of the injury.

Claimant worked as a welder for only 22 weeks for the Employer in the year prior to her injury, which is not "substantially all of the year" as required for a calculation under subsections 10(a) and 10(b). See Lozupone v. Stephano Lozupone and Sons, 12 BRBS 148 (1979)(33 weeks is not a substantial part of the previous year); Strand v. Hansen Seaway Service, Ltd., 9 BRBS 847, 850 (1979)(36 weeks is not substantially all of the year). Cf. Duncan v. Washington Metropolitan Area Transit Authority, 24 BRBS 133, 136 (1990)(34.5 weeks is substantially all of the year; the nature of Claimant's employment must be considered, i.e., whether intermittent or permanent).

Section 10(c) of the Act provides:

> If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which [she] was working at the time of [her] injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C § 910(c).

The Administrative Law Judge has broad discretion in

determining annual earning capacity under subsection 10(c). Hayes v. P & M Crane Co., supra; Hicks v. Pacific Marine & Supply Co., Ltd., 14 BRBS 549 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity **at the time of injury**. Barber v. Tri-State Terminals, Inc., supra. Section 10(c) is used where a claimant's employment, as here, is seasonal, part-time, intermittent or discontinuous. Empire United Stevedores v. Gatlin, supra, at 822.

The parties stipulated to an average weekly wage of $647.45 at the time of Claimant's May 6, 2002 neck injury. (JX-1).

Because Claimant did not work for "substantially all of the year" prior to her December 2003 injury and because the record is devoid of payroll data reflecting the wages of a similarly situated employee of the same classification, I conclude that Sections 10(a) and 10(b) of the Act cannot be applied. Therefore, I further conclude Section 10(c) is the appropriate standard under which to calculate average weekly wage in this matter.

The Act defines wages as follows:

> The term "wages" means the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle c of the Internal Revenue Code of 1954 (relating to employment taxes). The term "wages" does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement.

33 U.S.C. §902(13).

Claimant received a $3,000.00 bonus on April 6, 2003, prior to the December 2003 injury, which Employer indicated was paid to all employees as an incentive to accept a labor contract and avert a strike. Claimant did not address the inclusion or exclusion of the bonus in her brief and did not offer any evidence of record to rebut Employer's characterization of the

bonus. Consequently, I find there is no record evidence to support a conclusion that the bonus represents compensation to Claimant for services rendered by her to Employer. Accordingly, I agree with Employer that the one-time $3,000.00 bonus should not be included in Claimant's gross income for the calculation of average weekly wage.

The record contains Claimant's wage records from December 15, 2002 through December 7, 2003. Claimant's testimony and the wage records indicate that Claimant did not work from April 2003 through December 2003. Specifically, the wage records contain a gap in Claimant's earnings from April 6, 2003 through November 9, 2003. On September 28, 2003, however, the wage record reflects compensation for eight hours of employment. (EX-21). Thus, Claimant worked 22 weeks during the foregoing pay period and earned gross wages of $19,773.28 for a total of 793.5 hours, which included both regular and over-time work. The exclusion of Claimant's April 6, 2003 bonus reduces Claimant's gross wages by $3,000.00 to a total of $16,773.28. Thus, I find and conclude Claimant earned an average weekly wage of $762.42 ($16,773.28 ÷ 22 = $762.42) at the time she injured her knees on December 9, 2003.

F. De Minimis Award

In Metropolitan Stevedore Co. v. Rambo [Rambo II], 521 U.S. 121, the Supreme Court held that **de minimis** awards were appropriate in the instance where the claimant had no immediate economic harm; however, it was reasonably probable that he would suffer future economic harm from the present injury or disability. The purpose of the award is to provide a continuing nominal award designed to perpetuate the ability to utilize a Section 22 modification of the current order if there is a future economic harm, the trigger for the granting of a **de minimis** award is not the realization of a physical injury, rather, it is the possibility of economic harm.

In the present case, Claimant requests a **de minimis** award for the period of time between November 3, 2003 and December 17, 2003, during which she returned to modified employment earning wages greater than that earned at the time of the May 2002 injury. While Claimant did not immediately suffer an economic harm from the injury, I find and conclude that she is not entitled to a **de minimis** award during that period.

A claimant must demonstrate the significant potential that the injury will cause diminished capacity in the future. Gillus

v. Newport News Shipbuilding & Dry Dock Co., 37 BRBS 93 (2003); see also Rambo II, 521 U.S. at 126; Barbera v. Director, OWCP, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001); Randall v. Comfort Control, Inc., 725 F.2d 791, 16 BRBS 56(CRT) (D.C. Cir. 1984); Hole v. Miami Shipyard Corp., 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981). In the present case, Claimant did not present medical evidence to establish a reasonable probability that her neck injury alone would result in future economic harm. Claimant was able to work at modified job duties and presented no evidence that her disability would deteriorate or that her position with employer was not secure. In fact, Claimant had reached MMI with respect to her neck injury prior to November 3, 2003. Further, Claimant was terminated from her modified employment only after sustaining an additional injury to her knees and receiving additional work restrictions.

Further, I find and conclude that a **de minimis** award in the present case would not be in accord with the purpose of the award. Claimant sustained a second injury in December 2003 which rendered her totally and permanently disabled due to the combination of restrictions assigned to her neck and her knees. Accordingly, based on the findings in this decision and order, a compensation award is issued which considers the actual economic harm suffered by Claimant as a result of both injuries. Consequently, I find and conclude that a **de minimis** award is unnecessary to perpetuate Claimant's ability to utilize Section 22 modification, should such modification become appropriate.

Based on the foregoing, I find and conclude that Claimant's request for a **de minimis** award for the period of November 3, 2003 to December 17, 2003, is inappropriate and is **DENIED.**

G. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the

expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

I find and conclude Employer is liable for all reasonable and necessary medical expenses arising out of Claimant's compensable neck and knee injuries.

H. Section 8(f) Application

Section 8(f) of the Act provides in pertinent part:

> (f) Injury increasing disability: (1) In any case which an employee having an existing permanent partial disability suffers [an] injury . . . of total and permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide in addition to compensation under paragraphs (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only.
>
> (2)(A) After cessation of the payments . . . the employee . . . shall be paid the remainder of the compensation that would be due out of the special fund established in section 44 . . . 33 U.S.C. § 908(f).

Section 8(f) shifts liability for permanent partial or permanent total disability from the employer to the Special Fund

when the disability is not due solely to the injury which is the subject of the claim. Director, OWCP v. Cargill Inc., 709 F.2d 616, 619 (9th Cir. 1983).

The employer must establish three prerequisites to be entitled to relief under Section 8(f) of the Act: (1) the claimant had a pre-existing permanent partial disability; (2) the pre-existing disability was manifest to the employer; and (3) that the current disability is not due solely to the employment injury. 33 U.S.C. § 908(f) Two "R" Drilling Co., Inc. v. Director, OWCP, 894 F.2d 748, 750, 23 BRBS 34 (CRT) (5th Cir. 1990); 33 U.S.C. § 908(f); Director, OWCP v. Campbell Industries, Inc., 678 F.2d 836 (9th Cir. 1982), cert. denied, 459 U.S. 1104 (1983); C&P Telephone Co. v. Director, OWCP, 564 F.2d 503 (D.C. Cir. 1977), rev'g 4 BRBS 23 (1976); Lockhart v. General Dynamics Corp., 20 BRBS 219, 222 (1988). In cases of permanent partial disability, the employer must also prove that the claimant's level of disability is "materially and substantially greater than that which would have resulted from the subsequent injury alone." See Two "R" Drilling, supra; Louis Dreyfus Corp. v. Director, OWCP, 125 F.3d 884 (5th Cir. 1997)(following the rationale in Two "R" Drilling, supra).

An employer may obtain relief under Section 8(f) of the Act where a combination of the claimant's pre-existing disability and her last employment-related injury result in a greater degree of permanent disability than the claimant would have incurred from the last injury alone. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 676 F.2d 1110 (4th Cir. 1982); Comparsi v. Matson Terminals, Inc., 16 BRBS 429 (1984). Employment related aggravation of a pre-existing disability will suffice as contribution to a disability for purposes of Section 8(f), and the aggravation will be treated as a second injury in such case. Strachan Shipping Company v. Nash, 782 F.2d 513, 516-517, 18 BRBS 45 (CRT) (**5th Cir.** 1986) (rehearing en banc), aff'g 15 BRBS 386 (1983).

Section 8(f) is to be liberally applied in favor of the employer. Maryland Shipbuilding and Drydock Co. V. Director, OWCP, U.S. DOL, 618 F.2d 1082 (4th Cir. 1980); Director, OWCP v. Todd Shipyards Corp., 625 F.2d 317 (9th Cir. 1980), aff'g Ashley v. Todd Shipyards Corp., 10 BRBS 423 (1978). The reason for this liberal application of Section 8(f) is to encourage employers to hire disabled or handicapped individuals. Lawson v. Suwanee Fruit & Steamship Co., 336 U.S. 198 (1949).

"Pre-existing disability" refers to disability in fact and

not necessarily disability as recorded for compensation purposes. Id. "Disability" as defined in Section 8(f) is not confined to conditions which cause purely economic loss. C&P Telephone Company, supra. "Disability" includes physically disabling conditions serious enough to motivate a cautious employer to discharge the employee because of a greatly increased risk of employment related accidents and compensation liability. Campbell Industries Inc., supra; Equitable Equipment Co., Inc. v. Hardy, 558 F.2d 1192, 1197-1199 (5th Cir. 1977).

The Regional Solicitor did not file a post-hearing brief on behalf of the District Director in this matter. On October 26, 2004, the Regional Solicitor submitted a copy of its "Denial Notice" dated April 4, 2003. Consequently, I will assume the District Director opposes Employer's request for Section 8(f) relief for the reasons set forth in the "Denial Notice."

1. Pre-existing permanent partial disability

I find that the medical evidence of record establishes that Claimant suffered a pre-existing permanent partial disability to her right leg. Claimant testified that she sustained a right knee injury in 1991 and subsequently underwent right knee surgeries in 1992 and 1993. The record contains a letter from Dr. Enger dated January 8, 1993, which stated that Claimant was released to work on October 19, 1992 with a 10% permanent partial disability to her right knee and restrictions on climbing and squatting. Based on the foregoing, it is apparent that Claimant sustained a scheduled injury for which she was assigned a permanent partial impairment rating and work restrictions. Consequently, I find and conclude Employer successfully established that Claimant suffered from a pre-existing permanent partial disability to her right knee.

I further find and conclude that the medical evidence establishes a pre-existing permanent partial disability to Claimant's neck. The medical reports of record indicate that Claimant sustained three separate injuries to her neck in 1992, 1999, and 2000. Following the 2000 injury, Dr. Dempsey noted degenerative changes present in Claimant's cervical spine and thoracic spine. I find and conclude that the presence of degenerative changes in Claimant's cervical spine, following an injury to her neck, is sufficient to establish a pre-existing permanent partial disability. See Greene v. J.O. Hartman Meats, 21 BRBS 214 (1988)(Degenerative disc disease, caused by aging, may be a pre-existing permanent partial disability).

2. Manifestation to the Employer

The judicially created "manifest" requirement does not mandate actual knowledge of the pre-existing disability. If, prior to the subsequent injury, employer had knowledge of the pre-existing condition, or there were medical records in existence from which the condition was objectively determinable, the manifest requirement will be met. Equitable Equipment Co., supra; See Eymard v. Sons Shipyard v. Smith, 862 F.2d 1220, 1224 (5th Cir. 1989).

The medical records need not indicate the severity or precise nature of the pre-existing condition for it to be manifest. Todd v. Todd Shipyards Corp., 16 BRBS 163, 167-168 (1984). If a diagnosis is unstated, there must be a sufficiently unambiguous, objective, and obvious indication of a disability reflected by the factual information contained in the available medical records at the time of injury. Currie v. Cooper Stevedoring Company, Inc., 23 BRBS 420, 427 (1990). Furthermore, a disability is not "manifest" simply because it was "discoverable" had proper testing been performed. Eymard & Sons Shipyard v. Smith, supra; C.G. Willis, Inc. v. Director, OWCP, 28 BRBS 84, 88 (CRT) (1994). There is not a requirement that the pre-existing condition be manifest at the time of hiring, only that it be manifest at the time of the compensable (subsequent) injury. Director, OWCP v. Cargill, Inc., 709 F.2d 616 (9th Cir. 1983) (en banc).

The record reflects that all of Claimant's pre-existing permanent partial disabilities occurred as a result of work-related accidents during her employment with Employer. Consequently, I find Claimant's pre-existing disabilities were manifest to Employer.

3. The pre-existing disability's contribution to a greater degree of permanent disability

Section 8(f) will not apply to relieve Employer of liability unless it can be shown that an employee's permanent total disability was not due solely to the most recent work-related injury. Two "R" Drilling Co. v. Director, OWCP, supra. An employer must set forth evidence to show that a claimant's pre-existing permanent disability combines with or contributes to a claimant's current injury resulting in a greater degree of permanent partial or total disability. Id. If a claimant's permanent total disability is a result of her work injury alone, Section 8(f) does not apply. C&P Telephone Co., supra;

Picoriello v. Caddell Dry Dock Co., 12 BRBS 84 (1980). Moreover, Section 8(f) does not apply when a claimant's permanent total disability results from the progression of, or is a direct and natural consequence of, a pre-existing disability. Cf. Jacksonville Shipyards, Inc. v. Director, OWCP, 851 F.2d 1314, 1316-1317 (11th Cir. 1988).

For permanent partial disability, the employer need only show that an increased permanent partial disability resulted when the prior and subsequent injuries are combined. Director, OWCP v. Ingalls Shipbuilding, Inc., 125 F.3d 303 (5th Cir. 1997). This is subject to the Congressional mandate that it be a "materially and substantially" greater level of disability. Id. n. 6; 33 U.S.C. §908(f)(1); Director, OWCP v. Bath Iron Works Corp. [Johnson], 129 F.3d 45 (1st Cir. 1997). The burden of establishing contribution or combination and resulting disability which is materially and substantially greater rests with Employer.

(a) The May 6, 2002 neck injury

I find that Employer established that Claimant's permanent partial disability after her May 6, 2002 work-related accident is "materially and substantially greater than that which would have resulted from the subsequent injury alone." On August 4, 2003, Dr. Smith opined within "reasonable medical probability" that Claimant's pre-existing neck injuries "combined with and contribute to the effects of the neck injury . . . she sustained on May 6, 2002 to render her materially and substantially more disabled than she would have been as a result of her injury of May 6, 2002 alone." Consequently, I find and conclude Employer has established that Claimant's permanent partial disability was not due solely to the May 6, 2002 injury and that the pre-existing injury combined with the May 6, 2002 injury to result in a greater degree of permanent partial disability.

Accordingly, I find and conclude that Employer established the three pre-requisites necessary for entitlement to Section 8(f) relief under the Act and is eligible to receive Section 8(f) relief as to the May 6, 2002 injury.

(3) The December 9, 2003 knee injuries

Section 8(f)(3) of the Act provides that an employer's request for Section 8(f) relief, and a statement of the grounds for such relief must be presented to the district director prior to consideration of the claim by the district director, and that

failure to do so will bar the payment of benefits by the Special Fund, unless the employer could not have reasonably anticipated that Special Fund liability would be at issue. 33 U.S.C. § 908(f)(3)(1988). The implementing regulations provide that the employer must file with the district director a fully documented application in support of its request for Section 8(f) relief. 20 C.F.R. § 702.321(a). The failure to submit a fully documented application by the date established by the district director shall be an absolute defense to the liability of the Special Fund. 20 C.F.R. § 702.321(b)(3). Such a failure is excused only where the employer could not have reasonably anticipated the liability of the Special Fund prior to the issuance of a compensation order. Id.; see also Lassiter v Nacirema Operation Company, 27 BRBS 168 (1993).

The record does not contain Employer's "Petition for Second Injury Fund Relief" for the December 9, 2003 injury, although Employer addressed the issue of Section 8(f) relief in its post-hearing brief.

I find and conclude that Employer has established both a pre-existing permanent partial disability and the manifestation element. For purposes of Section 8(f) relief with regard to the December 9, 2003 injury, I find and conclude Claimant's May 6, 2002 neck injury constitutes a pre-existing permanent partial disability, along with the previously discussed disabilities from the 1991 knee injury and the 2000 neck injury. I find and conclude Employer has satisfied the manifestation requirement for Section 8(f) relief because the May 2002 injury occurred during Claimant's employment with Employer.

Nonetheless, Employer did not submit any medical opinions to suggest that Claimant's prior injuries combined with or contributed to the level of disability sustained after the December 9, 2003 injury. The Fifth Circuit in Two "R" Drilling, supra, held the employer failed to establish that the claimant's disability was not due solely to the employment injury because "they put no medical evidence before the ALJ which suggests that [the claimant's] pre-existing disability in any way contributed to his current total disability."

Arguably, vocational evidence could suffice to establish the element of contribution. See Sproull v. Director, OWCP, 86 F.3d 895 (9th Cir. 1996) (An employer could "establish the contribution requirement by medical or other evidence"); Director v. Newport News Shipbuilding & Dry Dock Co. [Harcum], 8 F.3d 175, 27 BRBS 116 (CRT)(4th Cir. 1993), aff'd on other

grounds, 514 U.S. 122 (1995), 131 F.3d 1097 (4th Cir. 1997)(vocational rehabilitation expert can prove materiality prong of the contribution element).

Employer relies on the reports of Mr. Sanders to satisfy the contribution requirement. Mr. Sanders noted that the combination of the restrictions due to the May 6, 2002 injury and the December 9, 2003 injury resulted in an increased level of disability and caused a reduction in Claimant's earning capacity. After a review of Mr. Sanders's report, however, I find and conclude that the vocational evidence is insufficient to satisfy the contribution element. Mr. Sanders's report merely notes that Claimant was assigned restrictions to her neck and her knees. It offers no opinion as to Claimant's level of disability or whether the combination of the two injuries resulted in the lower earning capacity.

Nonetheless, consideration of Claimant's physical restrictions from a practical standpoint reveals that the neck and the subsequent knee injuries have combined to render Claimant more disabled than she would have been from the knee injury alone. Consequently, I find and conclude that the combination of injuries results in a materially and substantially greater level of disability than her knee injury alone.

Section 8(f) relief has already been granted for the May 6, 2002 injury and Claimant's level of physical disability as of that date has become materially and substantially greater because of the restrictions imposed by the December 9, 2003 injury. Accordingly, I find and conclude the combination of the two injuries buttress Employer's entitlement to Section 8(f) relief.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, the parties stipulated that no penalties are due regarding compensation for the May 6, 2002 neck injury. (EX-15). The parties stipulated that Employer was

notified of Claimant's knee injuries on December 10, 2003, and filed a notice of controverstion on December 18, 2003. (JX-1).

In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of her injury or compensation was due.[26] Thus, Employer was liable for Claimant's disability compensation payment for her knee injuries on December 24, 2003. Because Employer controverted Claimant's right to compensation, Employer had an additional fourteen days within which to file with the District Director a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n. 3 (1981). A notice of controversion should have been filed by January 7, 2004, to be timely and prevent the application of penalties. Consequently, I find and conclude that Employer timely filed a notice of controversion and is not liable for penalties.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed percentage rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is

[26] Section 6(a) does not apply since Claimant suffered his disability for a period in excess of fourteen days.

made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[27] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer shall pay Claimant compensation for permanent total disability from December 17, 2003 to May 9, 2004 based on Claimant's average weekly wage of $762.42, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

2. Employer shall pay Claimant compensation for permanent partial disability from May 10, 2004 to July 11, 2004 based on two-thirds of the difference between Claimant's average weekly wage of $762.42 and her reduced weekly earning capacity of $253.63 in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(21).

3. Employer shall pay Claimant compensation for permanent partial disability from July 12, 2004 to September 12, 2004, based on two-thirds of the difference between Claimant's average weekly wage of $762.42 and her reduced weekly earning capacity of $285.79 in accordance with the provisions of Section 8(c) of

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[27] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **March 23, 2004**, the date this matter was referred from the District Director.

the Act. 33 U.S.C. § 908(c)(21).

4. Employer shall pay Claimant compensation for permanent partial disability from September 13, 2004 through present and continuing based on two-thirds of the difference between Claimant's average weekly wage of $762.42 and her reduced weekly earning capacity of $258.15 in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(21).

5. Employer shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's May 6, 2002 and December 9, 2003, work injuries, pursuant to the provisions of Section 7 of the Act.

6. The Special Fund shall assume Employer's liability for payment of permanent partial and/or permanent total disability 104 weeks after May 6, 2002, in accordance with provisions of Section 8(f) of the Act. 33 U.S.C. § 908(f).

7. Employer shall receive credit for all compensation heretofore paid, as and when paid.

8. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

9. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 9th day of March, 2004, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge